DATE: August 1, 1996

CASE NO: 94-INA-520

In the Matter of:

CHURCHILL CABINET COMPANY,
Employer

On Behalf of:

ADAM FULAR,
Alien

Appearance: Stanley J. Horn, Esq.
Horn & Villasuso, Chicago, IL
for the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Adam Fular ("Alien") filed by Employer Churchill Cabinet Company ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Chicago, Illinois, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the

Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 4, 1992, the Employer filed an application for labor certification to enable the Alien to fill the position of "supervising wood machinist," which involved supervision of four employees during the hours of 10:00 p.m. until 6:00 a.m. Two years of experience in the job offered or as "wood machinist" was required. Under job duties, it was stated that the employee must be able to "speak, read and write in Polish to supervise Polish speaking workers, to give oral and written instructions in Polish;" ability to speak, read and write in Polish was also listed as a special requirement (AF 21). In a supporting letter, the Employer's President, Roger E. Duba stated:

> The position we seek to fill is on our night shift from 10:00 P.M. to 6:00 A.M. and involves the supervision of four other workers. Because of the difficulties in finding employees who are willing to work these hours, we have been able to find only Polish workers for this shift. Consequently, the supervisor of this shift must be able to communicate with the workers in Polish.

(AF 33). In another letter, Mr. Duba indicated that the job offered was a promotion from the alien's previous job and "[t]he new position has the added duties of supervising employees, giving instructions as to job requirements to employees, performing quality control inspection on the night shift and keeping records of work performed on night shift." (AF 34).

An advertisement placed in the ***Chicago Sun-Times*** produced one applicant, who was rejected for lack of pertinent experience. (AF 26-28, 31-32, 35). There was no response to a letter to the applicant from the state agency. (AF 19-20).

On January 24, 1994, the CO issued a Notice of Findings in which she concluded, ***inter alia***, that the Polish language requirement has not been adequately documented as arising from business necessity as required by Section 656.21(b)(2).[1] The CO stated that in order for the employer to meet the burden of proof, "concrete evidence to support the Polish language requirement" must be provided and "[a] mere statement will not suffice." The CO stated that if this could not be accomplished,

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1 All section references are to title 20 of the Code of Federal Regulations.

the Employer must delete the requirement and readvertise. (AF 15-18).

The Employer submitted rebuttal under the February 7, 1994 letter of its attorney, citing ***Golden City Chinese Restaurant***, 89-INA-176 (January 4, 1990) and ***Hollytron,*** 88-INA-316 (September 28, 1989). (AF 13). An attached letter from Mr. Duba, the Employer's President, listed three employees who had worked the night shift for the past two years and noted that "[a]ll of the above individuals speak **only** Polish; we have been unable to attract qualified English speaking machinists for the night shift." Mr. Duba further stated that communication in Polish was required "to give specific job instruction, to discuss quality control, to discuss implementation of blueprint specification, and to give directions for machine set up on CNC controlled equipment." (AF 14). No further documentation or supporting information was provided.

On June 22, 1994, the CO issued a Final Determination in which she concluded that the Employer in rebuttal had failed to establish that the Polish language requirement is reasonably related to the job or that it is a necessity to perform the duties described in the job offer. Specifically, the CO stated that the documentation provided was a "mere statement" of the requirement "to communicate orally and in writing (job instructions and blueprint specifications)." The CO distinguished the cases cited as involving different occupations and duties for which adequate documentation (***i.e.*** samples of translated documents and persuasive statements) was provided. (AF 10-12).

The Employer requested review of that denial on July 1, 1994, citing additional cases. (AF 1-2).

DISCUSSION

The pertinent regulations provide that the job opportunity shall not include a requirement for a language other than English unless the employer documents that the foreign language requirement arises from business necessity. ***See*** 20 C.F.R. § 656.21(b)(2)(i); ***Advanced Digital Corporation***, 90-INA-137 (May 21, 1991). In order to establish business necessity under Section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to perform, in a reasonable manner, the job duties as described by the employer. ***In re Information Industries, Inc.***, 88-INA-82 (Feb. 8, 1989) (***en banc***). The business necessity standard set forth in ***Information Industries, supra,*** is applicable to a foreign language requirement. ***Coker's Pedigreed Seed Co.***, 88-INA-48 (Apr. 19, 1989) (***en banc***). The first prong of the business necessity test for a foreign language requirement

is met if the employer establishes the existence of a significant foreign language speaking clientele; the second prong is met if the evidence establishes that the employee's job duties require communicating in that language. ***See Details Sportswear,*** 90-INA-25 (Nov. 30, 1990); ***Hidalgo Truck Parts, Inc.***, 89-INA-155 (Mar. 15, 1990). A foreign language requirement may be justified by plans for expansion of business into a foreign market. ***Remington Products, Inc.,*** 89-INA-173 (Jan. 9, 1991) (***en banc***). It may also be justified when the business requires frequent and constant communication with foreign-speaking personnel. ***Capetronic USA Manufacturing, Inc.,*** 92-INA-18 (Apr. 12, 1993); ***Bestech Group of America, Inc.,*** 91-INA-381 (Dec. 28, 1992). ***See also Sysco Intermountain Food Services,*** 88-INA-138 (May 31, 1989) (***en banc***) (business necessity for knowledge of Cantonese and Mandarin dialects shown when contacts with restaurant owners and suppliers require communication in Chinese).

Written assertions that are reasonably specific and indicate their sources or bases are considered to be "documentation" within the meaning of the pertinent regulations. ***Gencorp,*** 87-INA-659 (Jan. 13, 1988)(***en banc)***; ***Greg Kare,*** 89-INA-7 (Dec. 18, 1989); ***Joanne and David Fields,*** 91-INA-2 (Nov. 23, 1992).

In the instant case, the documentation submitted by the Employer consists of various letters from its President attesting to the fact that the Alien will be supervising three Polish-speaking workers during the night shift and must be able to speak, read, and write Polish to communicate with these workers, who have been in the United States working for the Employer for the past two years yet are unable to speak or understand any English. These statements are unsupported by any documentary or other evidence and are simply not sufficiently credible standing on their own to carry the Employer's burden of proof.

In its request for review, the Employer cited ***Golden City Chinese Restaurant,*** 89-INA-106 (Jan. 4, 1990). In that case, which involved a restaurant manager for a Chinese restaurant, the CO denied certification on the basis that knowledge of Chinese was unduly restrictive as it was a preference, not a necessity. The Board reversed, finding that the language requirement was reasonably related to the job and essential to perform the job duties, based on the employer's contention that the restaurant manager needed to be fluent in Chinese in order to communicate with its two Chinese chefs regarding orders for food supplies, invoice corrections, customer complaints, and special menus for banquets. That case is distinguishable from the instant case because the issue was not whether the documentation was sufficient but whether the employer's explanation was

sufficient.[2] The Board also rejected the CO's assertion that the Employer has the burden of proving its restaurant would not be able to continue operating if the restaurant manager could not speak, write, and read Chinese, thus requiring an inappropriate burden of proof; such an inappropriate assertion has not been made in the instant case.

Taken as a whole, we agree with the CO that the Employer's documentation in the instant case fails to satisfy the standard set forth in section 656.21(b)(2)(i)(C), which requires that the language requirement be "adequately documented as arising from business necessity." The conclusory statement that Polish workers who have been in the United States for two years cannot communicate at all in English so that their supervisor must be fluent in Polish is not sufficiently credible to satisfy the Employer's burden of proof without additional supporting documentation.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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PAMELA L. WOOD
Administrative Law Judge

[2] ***Hollytron,*** 88-INA-316 (September 28, 1989), also cited by the Employer, dealt with a company 80% of whose business was dependent upon the Korean community, and the employer there had adequately documented the need for communication with them in Korean.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Churchill Cabinet Company (Adam Fular, alien)

Case No. : 94-INA-520

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: